TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~414~~. 133

JOHN B. SCHOLEY, PLAINTIFF IN ERROR,

vs.

FRANCIS S. REW.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED MARCH 8, 1873.

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1 United States circuit court, northern district of New York.

Pleas before the judges of the circuit court of the United States for the northern district of New York in the second circuit at the March adjourned term of said court, A. D. 1871. Present: The honorable Lewis B. Woodruff, circuit judge; Charles Mason, clerk.

NORTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, at the March adjourned term of said court, A. D. 1871, to wit, and of the 10th day of June, A. D. 1871, came John B. Scholey, by Theodore Bacon, his attorney, and brought into said court his certain declaration against Francis S. Rew, which said declaration was and is in the words and figures following, to wit:

2 Circuit court of the United States for the northern district of New York, of March term, to wit, of the 9th day of June, in the year eighteen hundred and seventy-one.

NORTHERN DISTRICT OF NEW YORK, *ss:*

John B. Scholey, who is a subject of the Queen of the United Kingdom of Great Britain and Ireland, and an alien, by Theodore Bacon, his attorney, complains of Francis S. Rew, who is a citizen of the State of New York and the United States, and is collector of internal revenue for the United States for the twenty-eighth collection district of said State, and who resides at Rochester in the county of Monroe, in the said northern district of New York, defendant in this suit, of a plea of trespass on the case on promises:

For that whereas the said defendant heretofore, to wit, on the thirtieth day of May, in the year 1871, at Rochester aforesaid, in said twenty-eigth collection district, was indebted to the said plaintiff in the sum of two thousand seven hundred dollars, for so much money by the said defendant before that time had and received to and for the
3 use of said plaintiff, and being so indebted to the said defendant in consideration thereof, afterwards, to wit, on the day and year aforesaid, at Rochester aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said last-mentioned sum of money when he, the said defendant, should be thereunto afterwards requested; nevertheless the said defendant, not regarding his said several promises and undertakings, but contriving and fraudulently intending, craftily and subtly, to deceive and defraud the said plaintiff in this behalf, has not as yet paid the said sum of money, or any part thereof, to the said plaintiff, although he, the said defendant, afterwards, to wit, on the day and year aforesaid, at Rochester aforesaid, was requested by the said plaintiff so to do; but the said defendant to pay him the same hath hitherto wholly neglected and refused, and still does neglect and refuse, to the damage of the said plaintiff of five thousand dollars; and therefore he brings his suit.

THEODORE BACON,
Plaintiff's Attorney, Rochester, N. Y.

(Indorsed:) U. S. circuit court, northern dist. of N. Y. John B. Scholey vs. Francis S. Rew, narr. Theodore Bacon, plaintiff's attorney, Rochester, N. Y. Orig. filed June 10, 1871.

4 And afterwards, to wit, on the 14th day of July, A. D. 1871, the said defendant, Francis S. Rew, appeared in said action by Richard Crowley, his attorney, and on the 14th day of July, A. D. 1871, filed his plea to the said declaration of the said plaintiff as appears by the paper hereto annexed.

5 Circuit court of the United States for the northern district of New York, of March, adjourned term in the year 1871.

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And the said defendant, Francis S. Rew, by Richard Crowley, his attorney, comes and defends the wrong and injury when, &c., and saith that he did not undertake or promise in manner or form as the said plaintiff hath above thereof complained against him, and of this he puts himself upon the country; and the said plaintiff doth the like.

RICHARD CROWLEY,
Attorney for Defendant.

(Indorsed:) Circuit court of U. S., N. D. of N. Y. John B. Scholey vs. Francis S. Rew. Plea. Richard Crowley, U. S. Attorney. Orig. filed July 14, 1871.

6 U. S. circuit court, northern district of New York.

JOHN B. SCHOLEY
vs.
FRANCIS S. REW.

A trial by jury in above action is hereby waived, and it is hereby stipulated and agreed that the said action may be tried and determined by the court, the finding of the court upon the facts to have the same effect as the verdict of a jury.

And it is further hereby stipulated and agreed that the said action be tried as aforesaid at an adjourned term of said court, appointed to be held at Albany, on the third Tuesday of January, A. D. 1872.

Dec. 13, 1871.

RICHARD CROWLEY,
Attorney for Def't.
THEODORE BACON,
Attorney for Pl'ff.

(Indorsed:) U. S. circuit court north. dist. of N. Y. John B. Scholey vs. Francis S. Rew. Stipulation waiving trial by jury, & that case be tried by court, 3d Tuesday January, 1872. Orig. filed January 16, 1872.

7 And the said cause was continued down to the January adjourned term of said circuit court held at the city-hall in the city of Albany, in and for said district, on the 19th day of January, A. D. 1872, before the honorable Lewis B. Woodruff and Nathan K. Hall, judges of said court, it having been previously stipulated by the attorneys for the respective parties that trial by jury should be waived, and that the decision of the court should stand as the verdict of a jury; the aforesaid issues so

joined between the said parties as aforesaid, came on to be tried, at which time and place came as well the said defendant, by Richard Crowley, his attorney, as the said plaintiff, by Theodore Bacon, his attorney.

And because the said judges now here are not yet advised what judgment to give, the said cause is continued until the June term of said circuit court, A. D. 1872, held at the court-house in the village of Canandaigua, on the 3d Tuesday of June, A. D. 1872, and the same day is given to the parties aforesaid at the same place to hear the judgment of the said court thereon.

8 At which last-mentioned day, before the said judges at the place last aforesaid, came the parties aforesaid by their respective attorneys aforesaid, and an order was entered in the words and figures following, to wit:

9 At a stated term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at the village of Canandaigua on Tuesday, the 18th day of June, in the year of our Lord one thousand eight hundred and seventy-two.

Present: The hônorable Lewis B. Woodruff and Nathan K. Hall, judges.

JOHN B. SCHOLEY }
vs.
FRANCIS S. REW. }

A stipulation having been filed herein, allowing this cause to be tried by the court without a jury, and the decision of the court to stand as the verdict of a jury, and the said cause having come on for trial at the January adjourned term of this court, 1872, and the court having considered the same, ordered judgment for defendant.

10 U. S. circuit court, northern district of N. Y.

JOHN B. SCHOLEY }
vs.
FRANCIS S. REW. }

The plaintiff excepts to the decision of the court ordering judgment for the defendant.

THEODORE BACON,
Plaintiff's Attorney, Rochester.

(Indorsed:) U. S. circuit court, northern district of N. Y. John B. Scholey vs. Francis S. Rew. Exception. Theodore Bacon, plaintiff's attorney, Rochester. (Orig.) Filed July 9, 1862.

11 Wherefore it is considered that the said defendant, Francis S. Rew, so recover against the said plaintiff, John B. Scholey, his costs and charges about his defense in this behalf sustained, taxed at thirty-eight dollars and thirty cents, ($38.30.) and that execution issue thereof.

Judgment signed this 11th day of July, A. D. 1872.

CHARLES MASON, *Clerk.*

12 (Indorsed.) United States circuit court, northern dist. of N. Y. John B. Scholey vs. Francis S. Rew. Judgment record. Taxed costs $38.30. Richard Crowley, atty. for def't. Orig. Filed July 11, 1872, 5 o'cl'k p. m.

13 *Bill of exceptions.*

United States circuit court, northern district of New York.

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FRANCIS S. REW.

Afterwards, to wit, at the day and place within contained, before the honorable Lewis B. Woodruff and the honorable Nathan K. Hall, judges of the said circuit court, comes as well the said John B. Scholey, by Theodore Bacon, his attorney, and Henry R. Seldon, his counsel, as the said Francis S. Rew, by Richard Crowley, esq., his attorney and counsel, and the said parties, by their said attorneys and counsel, having waived a trial by jury herein, and stipulated that this action might be tried and determined by the court, the finding of the court upon the facts to have the same effect as the verdict of a jury. The counsel for the plaintiff offered to prove, and it was admitted by the defendant's counsel as follows:

That in February, 1863, Isaac R. Elwood, a citizen of Roches-
14 ter, Monroe County, New York, died, leaving a large amount of personal property, besides certain real estate; that in October, 1867, his widow, Elizabeth G. Elwood, married the plaintiff, John B. Scholey, who was then, and still is, a subject of the Queen of Great Britain, and an alien; that in September, 1869, said Elizabeth G. E. Scholey died at Rochester aforesaid, leaving a last will and testament, which, on the first day of November, 1869, was duly admitted to probate in the surrogate's court of said county of Monroe, a court having jurisdiction thereof.

That, by said will, the said testatrix bequeathed five several annuities to be paid during the respective life-times of the five several legatees, amounting to the total annual sum of four thousand one hundred dollars; bequeathed certain articles of personal property specifically, and several sums of money, amounting to six thousand five hundred dollars, and devised and bequeathed all the rest, residue, and remainder of her estate, both real and personal, to the plaintiff, who was thereby
15 appointed executor thereof, together with one George H. Mumford, and one David F. Worcester.

That the plaintiff was assessed by the assessor of internal revenue for the 28th collection district of New York, in which he resided, for a succession tax of six per cent. upon forty-five thousand dollars as the value of one-third interest in a certain stone block known as the Elwood block, on the northeast corner of State and Buffalo streets, in the city of Rochester.

That, at the time of such assessment, and at all other times, the plaintiff claimed and protested that he was not liable to such tax; that he was not then, and never was, entitled to said real estate, or any part thereof; that he had not then, and never had, any interest therein as a successor.

That such assessment was transmitted to the defendant as collector of internal revenues for said 28th collection district for collection.

That the plaintiff duly appealed from such assessment to the
16 Commissioner of Internal Revenue, according to the provisions of law in relation thereto, and the regulations of the Secretary of the Treasury established in pursuance thereof, and that such appeal was decided by said Commissioner adversely to the plaintiff within six months prior to the bringing of this suit.

That thereupon the plaintiff paid the defendant, on the 30th day of May, 1871, the amount so assessed, being two thousand seven hundred dollars, under compulsion and protest, and, on the following day, demanded re-payment thereof, which was refused.

The plaintiff there rested his case.

On behalf of the defendant, his counsel offered to prove, and it was admitted by the plaintiff's counsel as follows:

That the plaintiff is a stranger in blood to Mrs. Elizabeth G. E. Scholey.

That the above-mentioned Isaac R. Elwood, at his death, left a last will and testament, which, on the eleventh day of March, 1863,
17 was duly admitted to probate in the surrogate's court of Monroe County, a court having jurisdiction thereof.

That, by the said will, the said testator bequeathed certain sums of money and personal property to his three children, and to a certain other person, and then directed that all the rest and residue of his estate, real and personal, should be divided and distributed by his executors between his wife, Elizabeth, and his son, Frank, and his daughters, Agnes and Elizabeth, all of whom survived him, according to the provisions of the statutes of the State of New York in such case provided, and in the same manner as respects said residue, as though he had died intestate.

That letters testamentary upon said will were duly issued to said Elizabeth G. Elwood, James W. Russel, and the said George H. Mumford, named therein as executors, and that they took upon themselves the discharge of the duties of such trust.

That, at a special term of the supreme court of New York, held
18 in the county of Ontario on the ninth day of May, 1864, an order was made by said court entitled "In the matter of the application of James W. Russel, executor, &c., for leave to invest moneys in real estate, &c., &c.," which order is as follows:

On reading and filing the petition of James W. Russel, bearing date May 6, 1864, setting forth, among other things, that he is the acting executor of the last will and testament of Isaac R. Elwood, late of the city of Rochester, deceased; that the assets of said estate, amounting to about the sum of five hundred thousand dollars, are chiefly invested in dividend-paying stocks and personal securities of various kinds; that the said petitioner has a large amount of money on hand which he is desirous of investing; that it is deemed for the interest of said estate to invest a portion of said assets in productive real estate in the city of Rochester.

That the said petitioner has in contemplation the purchase from the means of and for the said estate of certain property, situate on
19 the corner of State and Buffalo streets, in the city of Rochester, known as the Burns block, being about fifty-three feet on State street and about fifty-four feet on Buffalo street, for the price of about seventy-three thousand dollars, and that that is the fair value of said property, and praying the executrix and executor of said last will be authorized and empowered by this court to make such investment and purchase, such petition being duly verified.

On motion of Strong and Mumford, attorneys for said petitioner, it is hereby ordered, and this court, by virtue of the power and authority therein vested, does hereby order that the executrix and executor named in said last will and testament of said Isaac R. Elwood, which will bears date February 27th, 1863, and was duly proved March 11th, 1863, a copy of which

was annexed to said petition, be, and they are hereby, authorized and empowered to invest of the assets of the said estate which now are or shall hereafter come into their hands, so much as they
20 shall deem necessary for the interest of said estate in the purchase of the said real estate herein above and in said petition particularly referred to, upon such terms and to such amount as, in their judgment, shall be prudent and for the interest of said estate, and to such purchase and to hold the said real estate as such executrix and executors as aforesaid, and do all and every other act and thing necessary to enable them to acquire and perfect their title thereto.

The defendant's counsel further offered to prove, and it was admitted by the plaintiff's counsel, that on or about the tenth day of May, 1864, under, pursuant to, and by virtue of said order, said Elwood's said executors did take, accept, receive a conveyance of, and one Abigail P. Burns, of the city of Rochester aforesaid, did convey the premises above mentioned by deed of conveyance, dated May 5th, 1864, to the said Elizabeth G. Elwood, executrix; and the said James W. Russell and George H. Mumford, executors of the last will and testament of
21 Isaac R. Elwood, deceased, the survivor or survivors of them, their executors, and assigns, subject to certain encumbrances in said deed mentioned, which the said grantees, as such executors and executrix as aforesaid, did in and by said deed assume and agree to pay as part of the consideration in said deed stated, which consideration was therein stated to be seventy-two thousand six hundred and two $\frac{10}{100}$ dollars, and that the said Abigail P. Burns did thereby covenant and agree to and with the said grantees, the survivor or survivors of them, their successors, and assigns, that the premises so conveyed in the quiet and peaceable possession of the said grantees, the survivor or survivors of them, their successors and assigns, she would forever warrant and defend against any person lawfully claiming the same or any part thereof, except as against said encumbrances.

That said deed was duly recorded in said clerk's office of Mon-
22 roe County May 14th, 1864, in book 184 of deeds, at page 466.

That at the time of the death of said Isaac R. Elwood he was the owner of, and in possession of, four several parcels of real estate in said city of Rochester, one of them a vacant lot on Mill street, said real estate being *being* of the value of upwards of $50,000.

That the said executors, by the like authority of the supreme court, made improvements on the premises purchased, called the Elwood block, to the amount of $49,006.34, and erected a building on said Mill street lot, which cost $15,111.23, which improvements were completed about 1868—the spring of 1868.

That the said improvements to said Elwood block increased the value thereof to an amount at least equal to the cost thereof.

That the cost price of said Elwood block, and of the improvements made thereon as aforesaid, and the building erected on the Mill street lot, were, by the direction of the court, paid out of the personal property of Elwood's estate.

23 That said James W. Russell died in 1866. That on or about the month of February, 1870, the said George H. Mumford, as sole surviving executor of the last will and testament of said Isaac R. Elwood, commenced an action as plaintiff in the supreme court of the State of New York, in Monroe County, against the said Frank, Agnes, and Elizabeth Elwood, this plaintiff, John B. Scholey, and the said David F. Worcester, as executor with the said Mumford of the last will and testament of the said Elizabeth G. Scholey, and this plaintiff as

surviving husband of said Elizabeth G. Scholey, and residuary legatee under her last will and testament as defendants.

That the complaint in said action alleged, among other things, that the defendants, Frank, Agnes, and Elizabeth Elwood, were the only children and heirs at law of said Elizabeth G. Scholey.

That said complaint further alleged that said plaintiff was advised and believes that said Elizabeth G. Scholey acquired some interest in or title to the said premises on the corner of Buffalo and State
24 streets and the premises on Mill street above mentioned as a vacant lot, by reason of the same having been bought and improved out of the personal estate of said Elwood as above stated, and that the defendant, John B. Scholey, (this plaintiff,) by virtue of the will of said Elizabeth, claimed to have some title to or interest in the same.

That said complaint prayed that the accounts of said plaintiff as sole surviving executor, and of said Elizabeth G. Scholey as executrix, as far as the same had been settled before the surrogate, might be adjudged final and conclusive; that said plaintiff's accounts as surviving executor might be taken and stated down to the time of taking them, and might be adjudged final and conclusive upon all the parties interested therein who were parties to said action; that the accounts of said Elizabeth G. Scholey as executrix might be taken and stated, and that the executors of her will might be required to render such accounts, and an account of all rents or income of said real estate received
25 by her, and that the same might be finally settled; that an account might be taken and stated of all the personal estate of said Isaac R. Elwood, as the same existed at the time of his death, and at all times since down to the time of taking such account, and of the value thereof; that the right, title, share, and interest of the said Elizabeth G. Scholey in and to the personal estate of said Isaac R. Elwood, as the same existed at the time of her death, and as the same should exist at the time of such accounting, might be ascertained and determined; that it might also be determined what right or title she had in and to the said real estate, bought or improved out of the personal estate of said Isaac R. Elwood, as above stated. That the right, title, share, and interest being ascertained and determined, and all proper deductions therefrom being made, the same might be partitioned from the body of the estate of said Elwood, and that such disposition might be made hereof
26 as said court should determine. That the right, title, share, and interest of the defendants, Frank, Agnes, and Elizabeth, respectively, in and to the personal estate of their father, might be ascertained and determined, and that the same might be partitioned off to each of them in severalty; and that thereafter the share of each might be kept separate, to the end that such share, with the increase thereof, might be paid to each as he or she should become entitled to receive the same, with the usual general prayer for relief.

The defendant's counsel further offered to prove, and it was admitted by the plaintiff's counsel, that this plaintiff appeared in said action and answered said complaint.

That said answer admitted, among other things, the making of the various orders mentioned in the complaint, and the investment of the various sums therein mentioned in the purchase and improvement of real estate, but left the precise amount, being unknown to said de-
27 fendant, (this plaintiff,) to be determined on the trial of said action; and that although he did not recognize the binding character of such orders, he did not doubt the propriety of the several investments in case the advantages thereof were to be equitably shared by the parties

interested in the funds so invested in proportion to their respective interests.

That said answer further admitted that no division or distribution of said Elwood's personal estate had been made as alleged in the complaint, and that said defendant (this plaintiff) therein joined in the prayer of said complaint that the rights and interests of the parties in the several estates mentioned therein might be ascertained and declared. That the accounts of said plaintiff, Mumford, as surviving executor, might be settled; that the right, title, share, and interest of Elizabeth G. Scholey in and to the personal estate of said Elwood as the same existed at the time of her decease, and as the same should exist at the
28 time of such accounting might be ascertained and determined; that it might be determined what right, title, share, or interest she had in and to the real estate bought or improved out of the personal estate of said Elwood as stated in the complaint; that such right, title, share, and interest being ascertained and determined, the same might be partitioned from the body of said Elwood's estate, and that the share of said estate justly belonging to said Elizabeth G. Scholey at the time of her decease, and to her estate at the time of such accounting being ascertained and determined, the same, or such part thereof as should not be required to provide for the general and specific legacies given by said Elizabeth G. Scholey's will, should be transferred and delivered to said defendant (this plaintiff) as residuary legatee under said will.

The defendant's counsel further offered to prove, and it was admitted by the plaintiff's counsel, that the defendant, David F. Worcester, appeared in said action by George F. Danforth, his attorney, and the infant defendants, Frank, Agnes, and Elizabeth Elwood, by said Danforth, their guardian ad litem and attorney, and that all four of
29 said defendants united in an answer therein.

The defendant's counsel further offered to prove, and it was admitted by the plaintiff's counsel, that such proceedings were thereupon had in said action; that on the 29th day of September, 1870, an order was made therein in accordance with the laws of said State and the practice of said court, whereby it was referred to Addison Gardiner, George E. Mumford, and Samuel Wilder, as referees, for the following purposes:

First. To hear and determine said action and all the issues found therein, and to take proof of the facts and circumstances stated in said complaint.

Second. To take and state the accounts of the plaintiff as surviving executor.

Third. To take and state the accounts of said Elizabeth G. Scholey, as executrix, down to the date of her death.

Fourth. To take and state an account of all the personal estate of said Isaac R. Elwood, as it existed at his death, and as it should exist
30 at the date of such account and the value thereof.

Fifth. To ascertain and determine what was at that time the extent and value of the share, title, or interest in and to the said estate of said Isaac R. Elwood, which the plaintiff and said Worcester and said John B. Scholey, as executors of Mrs. Scholey, and said John B. Scholey as residuary legatee under the will of Mrs. Scholey, were entitled to receive under and by virtue of her will; and also to hear and determine all the claims and demands which either said Isaac R. Elwood's estate, or said Elizabeth G. Scholey's estate, had or claimed or could have or claim against the other or against any of the parties to this action.

Sixth. To ascertain and determine the right, title, share, and interest

of each of the defendants, Frank, Agnes, and Elizabeth, in and to the personal estate of said Isaac R. Elwood. Also to ascertain and determine actual partition could be made of said Elwood's personal estate between said Elizabeth G. Scholey's executors and the plaintiff Mumford, as said Elwood's sole surviving executor; and, if so, then
31 said referees were by said order authorized and empowered, as commissioners thereby appointed, to make such partition.

And that said referees were thereby further required to ascertain and determine whether said Elwood's personal estate could be actually partitioned as between the said Frank, Agnes, and Elizabeth, and, if so, they were thereby appointed commissioners to make such partition.

That said referees presented their report to said supreme court, dated November 5th, 1870, wherein they reported that, having been attended by counsel for all the parties to said action, and having heard all the proofs and allegations of the respective parties, they found as follows, among other things:

16. That the total amount and value of said Isaac R. Elwood's personal estate at his death was $331,709.

18. That the total amount and value at the date of said report of the personal estate of said Isaac R. Elwood subject to partition was $492,374.56, which sum and valuation included the building on
32 the lot on Mill street, at the valuation of $15,111.23, and the Elwood block, at the valuation of $135,000.

21. That the amount and value of said Elwood's personal estate subject to partition as it was at the date of said report, after deducting three specific bequests or charges contained in the last will of said Isaac R. Elwood, was $467,402.06, which sum included the Elwood block and Mill street building at the respective valuations aforesaid.

22. That the extent and value of the share, title, and interest in and to said Isaac R. Elwood's estate which said plaintiff Mumford, and the defendant Scholey, (this plaintiff,) and Worcester, as executors of Elizabeth G. Sholey and, said defendant, Scholey, as her residuary legatee, were entitled to receive, by virtue of said Isaac R. Elwood's will, amounted to $159,312.71, from which was to be deducted $4,418.61, theretofore paid by said plaintiff Mumford as surviving executor to said Elizabeth G. Sholey's executors, leaving $154.894.10 as the actual
33 value of the claim and interest of said Elizabeth G. Scholey's executors and residuary legatee in said Isaac R. Elwood's personal estate, over and above all claims and demands of either estate against the other.

23. That the right, share, and interest of said Frank, Agnes, and Elizabeth H. Elwood, respectively, in and to said Isaac R. Elwood's personal estate, over and above the several sums specifically bequeathed for their benefit, and after making proper allowance for moneys advanced for their benefit respectively by said surviving executor, was as follows: Frank, $104,113.22; Agnes, $103,359.87; Elizabeth, $105,034.87.

24. That said referees had ascertained and did determine that actual partition of said Isaac R. Elwood's personal estate could be made both between said Elizabeth G. Scholey's executors and said Mumford, as surviving executor of said Elwood, and also between said Frank, Agnes, and Elizabeth H. Elwood.

25. That said referees, as commissioners duly appointed by said order for the purpose, had made actual partition of said Elwood's
34 personal estate between said Elizabeth G. Scholey's executors and said Mumford, as surviving executor of said Elwood, and had set

apart to said Elizabeth G. Scholey's executors certain securities and a sum of money in said report particularly named, amounting in the aggregate to $154,894.10, from which was to be deducted said Mumford's fees as executor, and the same to be in full of all interest, claim, and demand whatsoever which said Elizabeth G. Scholey's executors and said defendant (this plaintiff) John B. Scholey had against said Elwood's estate or said Mumford, as executor thereof. That said securities were as follows:

United States bonds, valued at			$128,151 25
Railroad and telegraph bonds, valued @			7,525 00
One bond and mortgage	"	"	9,218 75
One promissory note	"	"	5,098 10
Railroad stock	"	"	720 00
Cash			4,181 01
			$154,894 10

26. That said referees, as such commissioners, had made actual partition of the shares and interests which said Frank, Agnes, and
35 Elizabeth H. Elwood respectively had in said Isaac R. Elwood's personal estate as between said Frank, Agnes, and Elizabeth, and had set apart to them severally the property, securities, and moneys particularly named in said report, amounting (including their several proportions of said Elwood block and Mill street building as aforesaid) to $104,113.22 for said Frank, to $103,359.87 for Agnes, and to $105,034.87 for Elizabeth H. Elwood.

That the several statements of property, securities, and money making up said three several amounts contained each the following as the last item therein: "As part of said three aggregates, add one-third of the appraised valuation of the Elwood block and Mill street building—$50,037.08."

That said commissioners further reported that they had not included the property known as the Elwood block in the partition between said Frank, Agnes, and Elizabeth, for the reason that the same was not capable of actual partition; but left the same to be partitioned with
36 the other real estate of the said Isaac R. Elwood, whenever such petition should be deemed expedient, and in the mean time recommended that said plaintiff Mumford, as trustee for said Frank, Agnes, and Elizabeth under the will of said Isaac R. Elwood, should be authorized to receive the rents, income, and profits of all said real estate, and credit the said Frank, Agnes, and Elizabeth severally the amounts to which they might respectively be entitled annually or oftener, as said plaintiff might deem advisable.

The defendant's counsel further offered to prove, and it was admitted by the plaintiff's counsel, that such proceedings were thereupon had in said action that, on the eighth day of December, 1870, a final judgment and decree was made and entered therein, whereby, on reading and filing the report aforesaid, by which report it appeared that they had been attended by the parties and their counsel, that they had heard and decided all the issues in said action, and that, pursuant to their
37 decision as referees, they, as commissioners duly appointed by said order, had made actual partition of all said Elwood's personal estate as between said plaintiff as sole surviving executor, and the defendants Worcester and John B. Scholey, as executors, with said Mumford, of said Elizabeth G. Scholey, and said John B. Scholey, as her re-

siduary legatee, so far as such estate was known, and which was believed to embrace the entire estate, and that they had set apart to said Elizabeth G. Scholey's executors the securities above mentioned, as the full share of said Isaac R. Elwood, to which said Elizabeth's executors and said John B. Scholey, as her residuary legatee, were entitled, and as and for a full and final settlement of all the rights, title, claim, share, or demand in law or in equity of said Elizabeth G. Scholey's executors and of said John B. Scholey, as residuary legatee, into and against said Elwood's estate, or the plaintiff, as his executor, so far as such es-
38 tate was known, and which was believed to embrace the entire estate; and that said commissioners had also made actual partition of said Elwood's personal estate, as between his children, the said Frank, Agnes, and Elizabeth, as they were severally entitled to share in the same under the will.

That said commissioners had partitioned and set apart to said Frank, Agnes, and Elizabeth, as follows: 1. To said Agnes, the securities, money, and property above mentioned, of the value of $103,359.87, as in full of her share of said Elwood's personal estate, including the undivided one-third of the Elwood block. 2. To said Frank they had set apart the securities, money, and property above mentioned, of the value of $104,113.$\frac{22}{100}$, including the undivided one-third of said Elwood block, as in full of his share of said Isaac R. Elwood's personal property. 3. To said Elizabeth, they had set apart the securities, money, and property above mentioned, of the value of $105,034.$\frac{87}{100}$, including the undivided one-third of said "Elwood block," as in full of her share
39 of said Elwood's personal estate. It was, upon hearing counsel for the respective parties, ordered, adjudged, and decreed that said report should be, and the same was thereby, in all things, confirmed; and that the partition made by said commissioners of said Elwood's personal property, as between the several parties entitled thereto, as above recited, and as appeared by said report, should be firm and effectual forever.

That it was thereby further adjudged that said plaintiff Mumford should on demand transfer and deliver to said Worcester and John B. Scholey, (this plaintiff,) as said Eliz'beth G. Scholey's executors, all the securities and money set apart to them as aforesaid, to be by them held, in connection with their said co-executor Mumford, as said Elizabeth G. Scholey's executors. And that upon the transfer and delivery of said securities and money, the same should be and was thereby adjudged to be in full and actual partition of all the share, right, title, and interest of said Elizabeth G. Scholey's executors and of said John B. Scholey, as her husband and as her residuary legatee, in and to said Isaac R. Elwood's property and estate, so far as such estate was then known as aforesaid, and in full and final settlement of all claims and de-
40 mands which her executors or said John B. Scholey as residuary legatee, or as husband or otherwise, had, or which they or any of them had or claimed to have against said Elwood's estate, or against said plaintiff Mumford, or the defendants Frank, Agnes, and Elizabeth, or any of them.

That it was thereby further adjudged that the plaintiff Mumford's accounts as said Elwood's executor were correct, final, and conclusive upon all the parties to said action, and that the whole of said Elwood's personal estate, including the division of his real estate, received of said plaintiff, as the same existed in his hands, November 1st, 1870, was as fully set forth in said report.

That it was further adjudged that said plaintiff, as sole surviving ex-

ecutor and as trustee under said will, and as trustee by said judgment appointed, should remain in the possession, custody, and control of the several and respective shares of the personal property partitioned and set apart as aforesaid to said Frank, Agnes, and Elizabeth
41 H. Elwood, until they should severally become entitled to receive the same, and that as trustee as aforesaid said plaintiff also take (and he was thereby authorized and empowered to take) and hold possession of all the real estate owned by said last-named defendants, or any of them, including said Elwood block, and to rent, manage, repair, and take care of the same, in such manner as he should deem for their best interest, until they should respectively become of age, and that he should keep account of the income thereof.

That it was further adjudged that whenever by the terms of said Elwood's will the said Frank, Agnes, and Elizabeth should respectively become entitled to receive his or her share of said personal estate, as the same had been duly partitioned between them as aforesaid, that he transfer the same, with all the accumulations thereof, and that in the mean time he keep the share of each as it had been actually
42 partitioned, together with the income thereof, separate and distinct, and that he keep the share of each separately invested.

That it was thereby further adjudged that the costs and expenses of said action as therein allowed should be paid out of the personal estate partioned as aforesaid in the proportion of one-third by Elizabeth G. Scholey's executors and two-thirds by said Frank, Agnes, and Elizabeth, equally, and that it was thereby finally adjudged that the plaintiff Mumford's commissions as said Edwood's executor should be paid out of said several funds.

The defendant then rested his case.

The court thereupon found as matters of fact the several facts so as aforesaid offered to be proved and admitted upon the part of the plaintiff and of the defendant.

Whereupon the plaintiff's counsel requested the court to order
43 judgment for the plaintiff for two thousand seven hundred dollars, with interest thereon from May 31, 1870. The court refused so to order or decide, to which refusal and decision the plaintiff, by his said counsel, duly excepted.

The court thereupon found and decided as matter of law that the defendant was entitled to judgment against the plaintiff upon the merits of said action, to which finding and decision the plaintiff, by his said counsel, duly excepted.

The court thereupon ordered judgment in favor of the defendant against the plaintiff upon the merits of said action, to which decision and order the plaintiff, by his said counsel, duly excepted.

And because none of the said exceptions so offered and made to the decisions of said court do appear upon the records of the said trial, therefore, upon the prayer of the said plaintiff, by his said counsel, the said judges have to this bill of exceptions set their seals according to the practice of said court, this tenth day of February, 1873.

L. B. WOODRUFF. [L. S.]
N. K. HALL. [L. S.]

44 (Endorsed:) United States circuit court, northern district of N. Y. John B. Scholey vs. Francis S. Rew. Bill of exceptions. Theodore Bacon, plaintiff's attorney. Rochester, N. Y. (Original.) Filed Feb'y 15, 1873.

45 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between John B. Scholey, plaintiff, and Francis S. Rew, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may
46 cause further to be done therein what of right and according to the laws and customs of the United States should be done.

Witness the honorable Salmon Portland Chase, Chief Justice of the said Supreme Court, this 20th day of July, in the year of our Lord one thousand eight hundred and seventy-two.

[SEAL.] CHARLES MASON, *Clerk.*

(Indorsed:) U. S. Supreme Court. John B. Scholey, plaintiff in error, vs. Francis S. Rew, defendant in error. Writ of error. Theodore Bacon, attorney for plaintiffs in error, Rochester, N. Y.

Allowed to issue with citation on filing bond as approved.

Dated July 16th, 1872.

N. K. HALL,
U. S. Dist. Judge, &c., Northern Dist. of New York.

Filed July 20, 1872.

47 The United States of America to Francis S. Rew, greeting.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of New York, wherein John B. Scholey is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Nathan K. Hall, one of the judges of the said circuit court of the United States for the northern district of New York, this 16th day of July, 1872.

N. K. HALL,
District Judge of the United States for the Northern District of New York, and one of the Judges of the Circuit Court of said District

48 NORTHERN DISTRICT OF NEW YORK,
County of Monroe, ss:

Theodore Bacon, of Rochester, in said county, of full age, being duly sworn, says: On the 19th day of July, 1872, at Rochester aforesaid, I served the within citation upon Francis S. Rew, defendant in error, therein named, by delivering to and leaving with him personally a true copy thereof, and at the same time showing him the original, and calling his attention to the signature of the judge thereon; and I knew the person so served to be the same person mentioned and described therein as defendant in error.

THEODORE BACON.

Sworn before me this 18th day of July, 1872.

HOMER H. WOODWARD,
Notary Public.

(Indorsed:) U. S. Superme Court. John B. Scholey, plaintiff in error, vs. Francis S. Rew, defendant in error. Citation & proof of service. Theodore Bacon, plaintiff's attorney, Rochester, N. Y. Filed July 20, 1872.

49

Know all men by these presents that we, John B. Scholey, principal, Henry R. Selden and Theodore Bacon, sureties, all of the city of Rochester, Munroe County, New York, are held and firmly bound to Francis S. Rew, of the same place, in the sum of five hundred dollars, to be paid to the said Francis S. Rew, his executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this tenth day of July, 1872.

Whereas the above-named John B. Scholey is about to prosecute a writ of error *from* the Supreme Court of the United States to reverse the judgment rendered by the circuit court of the United States for the northern district of New York in a certain action in which the said Scholey was plaintiff and the said Rew was defendant:

Now, therefore, the condition of this obligation is such that if the above-named John B. Scholey shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

50

J. B. SCHOLEY. [L. S.]
HENRY R. SELDEN. [L. S.]
THEODORE BACON. [L. S.]

STATE OF NEW YORK,
County of Munroe, ss:

On this tenth day of July, 1872, before me, personally appeared John B. Scholey, Henry R. Selden, and Theodore Bacon, to me known to be the same persons described in, and who executed the foregoing instrument, and severally acknowledged that they executed the same.

WALTER W. ADAMS,
Notary Public.

STATE OF NEW YORK,
County of Munroe, ss:

John B. Scholey, Henry R. Selden, and Theodore Bacon, being severally duly sworn, each for himself says: I am a resident of the State of New York, and am worth in property not exempt from execution one thousand dollars over and above all debts and liabilities which I owe or have incurred, and the said Selden and the said Bacon, each for
51 himself, further say: I am a householder and freeholder in the county of Munroe aforesaid.

J. B. SCHOLEY.
HENRY R. SELDEN.
THEODORE BACON.

Sworn before me this 10th day of July, 1872.

WALTER W. ADAMS,
Notary Public.

(Indorsed:) U. S. Supreme Court. John B. Scholey, plaintiff in error. vs. Francis S. Rew, defendant in error. Bond on writ of error. Theodore Bacon, plaintiff's attorney, Rochester, N. Y.

Approved: Writ to be a supersedeas.

N. K. HALL, *Judge*, &c.

Orig. Filed July 20, 1872.

52 UNITED STATES OF AMERICA,
Northern District of New York, ss:

I, Charles Mason, clerk of the circuit court of the United States of America for the northern district of New York, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, now on file and remaining of record in my office, being a full and complete copy of the record and proceedings in the suit of John B. Scholey vs. Francis S. Rew.

In testimony whereof I have hereunto set my hand, and duly affixed the seal of the said court, at the city of Utica, in said district, this of day March, A. D. 1873.

CHARLES MASON, *Clerk.*

53 (Indorsed:) Supreme Court of the United States. John B. Scholey, pl'ff in error, vs. Francis S. Rew, def't in error. Transcript of record.

(Indorsement on cover:) No. 414. John B. Scholey, plaintiff in error. vs. Francis S. Rew. N. New York. C. C. U. S. Filed 8th March, 1873.

O.

In the Supreme Court of the United States.

JOHN B. SCHOLEY
ag'st
FRANCIS S. REW.

In Error.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

The cause comes here by writ of error to the Circuit Court for the Northern District of New York, to review a judgment of that court signed July 11, 1872.

Writ of Error, Record p. 13.
Judgment, Record, p. 3.

The action was one of *indebitatus assumpsit* for money had and received; brought by the plaintiff in error, an alien, against the defendant in error, who is collector of Internal Revenue for the 28th Collection District of New York.

The plea was *non assumpsit.*

Declaration, p. 1.
Plea, p. 2.

The parties having waived a trial by jury and stipulated that the cause should be tried by the court, its finding upon

the facts to have the same effect as the verdict of a jury (*stipulation, p. 2*); the trial was had before Judges Woodruff and Hall, in January, 1872.

Upon the trial no questions of fact was raised; all the facts offered to be proved by either party were admitted by the other, and the court specifically found all such alleged facts as matters of fact.

Record, pages 4–12.

From these findings, which are set forth at large in the bill of exceptions (*ubi supra*), it appears that in February, 1863, Isaac R. Elwood of Rochester, N. Y., died, leaving a widow and three minor children, and a large amount of personal property, besides certain real estate. (*p. 4.*)

Mr. Elwood left a will, by which, after certain bequests of personal property, he directed that all the residue of his estate, real and personal, should be divided by his executors between his wife and three children, according to the statutes of New York, as if he had died intestate; and his wife, and G. H. Mumford and J. W. Russel, were appointed and acted as executors. (*p. 5.*)

In May, 1864, Russel, calling himself the acting executor of the will, presented to the Supreme Court of New York, a petition, setting forth that the assets of the estate were about $500,000, chiefly invested in personal securities, but including a large amount of money uninvested; that it was deemed for the interest of the estate to invest a portion of the assets in productive real estate in Rochester; and that he had in contemplation the purchase of certain property in Rochester, on the corner of Buffalo and State streets, for $73,000; and asking authority to make the purchase. (*p. 5.*)

In pursuance of this prayer an order was made authorizing the executors to invest so much as should be necessary of the assets of the estate in the purchase of such real estate; and "to purchase and to hold the said real estate as such executrix and executors." (*pages 5–6.*)

Under the authority of this order, the executors in May, 1864, took a conveyance of the premises to themselves as executors of Isaac R. Elwood's will, the survivor or survivors of them, their successors or assigns, for $72,602.10. (*p. 6.*)

At the time of Mr. Elwood's death, he owned four parcels of real estate in Rochester, one of them a vacant lot on Mill street, which parcels were altogether of the value of $50,000. After the purchase of the Buffalo and State street property, the executors, by authority of the Supreme Court of New York, made improvements upon it at a cost of $49,006.34, which increased the value of the property at least to that amount; and erected a building on the vacant Mill street lot which cost $15,111.23. These improvements were completed in the spring of 1868, and were paid, as was also the purchase price of the Buffalo and State street property (known as the "Elwood Block"), out of the personal property of Mr. Elwood's estate. (*p. 6.*)

In October, 1867, this plaintiff married Mrs. Elizabeth G. Elwood, the widow of Isaac R. Elwood; and in September, 1869, she died, leaving a will. By her will, after five annuities during the lives of the five annuitants, amounting altogether to $4,100, annually; certain specific legacies of personal property, and certain legacies of money, amounting to $6,500, she gave all the residue of her property, real and personal, to her husband, the plaintiff, and appointed him executor with the above named G. H. Mumford and one D. F. Worcester. (*p. 4.*)

In February, 1870, George H. Mumford, as sole surviving executor of Elwood's will (Russel having died in 1866), commenced an action in the Supreme Court of New York, against the three children of Elwood, this plaintiff (Scholey) and Worcester, as co-executors with Mumford of Mrs. Scholey's will, and Scholey also as husband and residuary legatee of Mrs. Scholey. (*pages 6–7.*)

The complaint in that action alleged that Mrs. Scholey acquired some interest in or title to the Elwood block, and the once vacant lot on Mill street, by reason of the same having been bought and improved out of Elwood's personal estate, and that Scholey, by virtue of Mrs. Scholey's will, claimed to have some title to or interest in it. It prayed that Mumford's accounts as sole surviving executor of Elwood, and Mrs. Scholey's as sole executrix, might be settled and adjudged final and conclusive, and that her executors might be required to render accounts in furtherance of that purpose, including an account of all rents or income of said real estate received by her; that an account might be taken of all Elwood's personal estate, and its value at the time of his death and at all times afterwards; that Mrs. Scholey's share in that personal estate at the time of her death and at the time of the accounting, and also "what right or title she had in and to the said real-estate, bought or improved out of the personal estate of" Elwood, might be determined. That when such share or interest should be determined, it should be partitioned from the body of Elwood's estate; that the shares of the three children in their father's personal estate might be determined and partitioned off to them in severalty, and that thereafter the share of each child might be kept separate, to the end that such share, with its increase, might be paid to each respectively as he or she should become entitled to receive it. (*p.* 7).

Scholey appeared and answered the complaint, admitting the making of the various orders and the investment of the sums mentioned in the purchase and improvement of real estate; denied the binding character of the orders, but admitted the propriety of the investments in case the advantages thereof were to be equitably shared by the parties interested in the funds invested, in proportion to their respective interests. He admitted that no distribution of Elwood's personal estate had been made, and joined in the prayer for an accounting and distribution, praying further that upon Mrs. Scholey's share being ascertained, the same, or such part of it as should

not be required to provide for the legacies given by her will, might be delivered to him as her residuary legatee. (*pp. 7–8*).

The other defendants also answered; and the same was referred to three referees to try the issues; to take and state the several accounts mentioned in the complaint; to determine the extent and value of the interest in Elwood's personal estate, which Mrs. Scholey's executors, and her husband as her residuary legatee, were entitled to receive under her will; to determine the share of each of Elwood's children in his personal estate; to determine whether actual partition of his personal estate could be made between Mrs. Scholey's executors and Mumford as Elwood's surviving executor, and if so, to make such partition; and to determine whether Elwood's personal estate could be actually partitioned as between his three children, and if so to make such partition. (*pp. 8–9*).

These referees reported on the 5th of November, 1870, among other things, as follows:

That Elwood's personal estate at his death amounted to $331,709.00; and at the date of the report to $492,374.56, which last sum included the building on the Mill street lot, at $15,111.23, and the Elwood block at $135,000.00; and that the value of such personal estate subject to partition at the latter date, after deducting three specific bequests or charges in Elwood's will, was $467,402.06, which sum included the Elwood block and Mill street building at the above valuation.

That the extent and value of the shares and interests of the several parties in Elwood's estate subject to partition, after making all proper de ductions, was as follows:

Mumford, Worcester and Scholey, as executors of Mrs. Scholey, and Scholey as her residuary legatee			$154,894 10
Elwood's children:	Frank	$104,113 22	
	Agnes	103,359 87	
	Elizabeth	105,034 87	$312,507 96
			$467,402 06

That the referees had determined that actual partition of said personal estate could be made between all said parties, and had made such partition, and had set apart to Mrs. Scholey's executors, in full of all claim which they or her residuary legatee might have upon Elwood's estate, the following property:

United States bonds	$128,151 25
Railroad and Telegraph bonds	7,525 00
Bond and Mortgage	9,218 75
Promissory note	5,098 10
Railroad stocks	720 00
Cash	4,181 01
	$154,894 10

That the referees had set apart to Elwood's three children their respective shares as above stated, schedules of which, similar to the foregoing were given; and each schedule contained as the last item: "One third of the appraised valuation of the Elwood block and Mill street building, $50,037.08."

That they had not included the Elwood block in the partition between Elwood's three children, because it was not capable of actual partition. (*pp. 9–10*).

A judgment was entered upon this report December 8, 1870, reciting the partition, including the setting apart to each of the children of the undivided one-third of the Elwood block; confirming such partition, and adjudging that the plaintiff Mumford should remain in possession of the Elwood block as trustee for the children until they should respectively become of age. (*pp. 9–10*).

Upon these facts the plaintiff here, Scholey, was assessed for a succession tax of six per cent. upon $45,000, as the value of one third interest in the Elwood Block. He always protested that he was not liable to such tax; that he never was entitled to such real estate or any part of it; and that he never had any interest in it as a successor. He appealed from the assessment to the Commissioner of Internal Revenue, who decided the appeal adversely to him; whereupon he paid the defendant, May 30, 1871, the amount so assessed, being $2,700, under compulsion and protest; and on the following day demanded re-payment thereof, which was refused. (*pp. 4, 5.*)

Upon the facts thus found, the plaintiff's counsel requested the Court to order judgment against the defendant for $2,700 and interest; and excepted to its refusal. (*p. 12.*)

The Court held, as matter of law, that the defendant was entitled to judgment; to which ruling, as well as to the direction of judgment in accordance with it, the plaintiff excepted. (*pp. 12, 3.*)

Judgment was entered accordingly for $38.30 costs. (*p. 3.*)

ASSIGNMENT OF ERRORS.

The sole question in the case is, was the plaintiff liable to a succession tax upon this property? The sole error assigned is the decision of the Court in the affirmative. (*p. 12.*)

POINTS.

The statute in relation to "succession taxes," in force at the time of Mrs. Elwood's death, in September, 1869, is the original Internal Revenue Act, as amended by the Act of July 13, 1866.

13 Statutes at Large, 287–291; §§ 126–150.
14 Id., 140–141.

It provides that for the purposes of the Act "the term 'real estate' shall include all lands, tenements and hereditaments, corporeal and incorporeal;" and that the term 'succession' shall denote the *devolution of title* to any real estate." (§ *126.*)

It enacts "that every past or future disposition of real estate by will, deed, or laws of descent, by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate, or the income thereof, upon the death of any person dying after the passing of this Act, shall be deemed to confer, on the person entitled by reason of any such disposition, a 'succession.'" (§ *127.*)

Sections 128 to 132 relate to circumstances which do not occur in the present case.

By section 133, "there shall be levied and paid to the United States in respect of every such succession as aforesaid, according to the value thereof," duties at the rates of one, two, four and five per cent, depending upon the degree of consanguinity between predecessor and successor; and where the successor is "a stranger in blood," at the rate of *six per cent.* The Act of March 3, 1865, provides that no succession duty shall be levied in any case, where the succession is from husband to wife. (*13 St. at Large, 481.*)

Section 137 provides that the duty "shall be paid at the time when the successor, or any person in his right or on his behalf, shall become *entitled in possession* to his succession, or to the receipt of the income and profits thereof;" except that if it afterwards becomes more valuable by the determination of a prior charge upon or interest in it, an additional duty shall then be paid on its increased value.

By section 138 "the interest of any successor in moneys to arise from the sale of real estate, under any trust for the sale thereof, shall be deemed to be a succession chargeable with duty under this Act, and the said duty shall be paid by the trustee, executor, or other person having control of the funds."

And, *per contra*, "the interest of any successor in personal property, subject to any trust for the investment thereof in the purchase of real estate *to which the successor would be absolutely entitled*, shall be chargeable with duty as above. (§ *139*.)

Sections 134 to 136, and 140 to 150, seem to throw no light upon the question here; and they complete the statutory provisions in relation to this tax.

All taxes on legacies and successions were abolished on and after October 1, 1870, by the act of July 14, 1870, §3.

16 Statutes at Large, 256–7

By the same statute which imposes the duty on the succession to real property, a duty is also laid on legacies and distributive shares of personal property (*13 Stat., 285–7*, § § *124*, *125*). But while the rates of duty, as in the case of real property, vary from one to six per cent., with the degree of consanguinity, all personal property passing *from wife to husband* is exempt from tax, as well as that which passes from husband to wife, the succession to real property being exempt *only* in the latter case. (*13 Stat., 286*, § *124*, *ad fin.*)

I.

The statute imposing this duty is unconstitutional and void, being within the prohibition in article 1, section 9, par. 4 of the Constitution.

The tax is a "direct tax," within all the decisions upon this subject; and it is not in proportion to the census.

The opinions in the famous carriage tax case (*Hylton vs. The U. S., 3 Dallas, 171*), while narrowing down the constitutional restriction to the utmost, one after another distinctly recognize "a tax on land" as the *only* direct tax contemplated by the Constitution, except a capitation tax.

Per Chase, J., p. 175.
Per Patterson, J., p. 177.
Per Iredell, J., p. 183.

These views are approved in *Pacific Insurance Co. vs. Soule, 7 Wall., 444-5. See also 1 Story's Comm. § 955.*

Veazie Bank vs. Fenno, 8 Wall. 533; per Chase, C. J., 542–546.

The present is a tax *on land*, if ever one was. No doubt it is to be paid by the owner of the land, if he can be made to pay it; but that is true of any tax that ever was, or ever can be, imposed on property. And as if to prove how directly the property, and not the property owner, is aimed at, the duty is made a specific lien and charge upon the land "in respect whereof" it is assessed. (*13 Stat. 290, § § 145-6.*

More than this: as if to show how identical, in the opinion of Congress, this duty was with the avowedly direct tax upon lands which it had levied but a year or two before, it enacts that this *succession tax alone*, out of a great revenue system filling 182 sections, should be "colleted by the same officers, in the same manner, and by the same processes as direct taxes upon lands under the authority of the United States." (*Sec. 150, p. 291*).

II.

Considering the Act as valid: Statutes in derogation of rights of property, or that take away the estate of a citizen, or which levy an excise or tax upon him, must be construed strictly.

Sharp vs. Speir, 4 Hill, 76.

In revenue laws, "if they be ambiguously and obscurely worded, the interpretation is ever in favor of the subject, for this plain reason, that the Legislature is ever at hand to explain its own meaning, and to express more clearly what has been obscurely expressed."

Hubbard vs. Johnstone, 3 Taunt., 220, 221; per Heath, J.

In Denn vs. Diamond, 4 B. & C., 243, conveyances on *sales* of land were subject to an *ad valorem* stamp duty; a conveyance by father to son in consideration of natural love, &c., and also of provision that day made by the son for his sisters, was held not subject to the duty.

In Sewall vs. Jones, 9 Pick., 412, a statute imposed a duty on all sales by auction of real or personal estate. Certain real estate having been *leased* by auction to the highest bidder, the duty was held not to attach. The Court say, per PARKER, C. J.: "This may be thought a close construction of the statute, but we are to suppose the Legislature intended nothing beyond what their language, in fair legal construction, will indicate. If the terms of their enactment have not embraced their object, the power is with them, by explanatory or additional acts, to extend them. (*p. 414*).

See also Mayor, &c., vs. Hartridge, 8 Geo., 30.
Bank of Georgia vs. Mayor, &c., Dudley, 132.
Attorney General vs. Bank of Newbern, 1 Dev. & Bat. Eq., 218, per Ruffin, C. J.
Adams vs. Bancroft, 3 Sumn. 384, 387; per Story, J.
United States vs. Watts, 1 Bond. 578, 583.

III.

This is such a statute; besides that it levies a most oppressive tax, it is highly penal upon any who do not submit to official interpretation of its provisions (§ 148, p. 291). And it subjects the real estate affected by it to a *lien* for the amount of the tax into whosesoevrs hands it may pass. (§ 145, *p.* 290.)

But we do not ask that specially strict rules of constuction be applied. We ask only that the statute be not extended by construction to a case not clearly within its terms.

IV.

This case is not within the act.

1.—There has been no "devolution of title to any real estate" (§ 126), either upon the plaintiff, or upon any one else. And this is the statutory definition of a "succession."

The *title* to the Elwood Block is, where it has always been since May, 1864, in the executors of Isaac R. Elwood.

2.—The plaintiff has not "become beneficially entitled, in possession or expectancy, to any real estate, or the income thereof." (§ 127.

His testatrix never was "entitled" to the Elwood Block, or to the income from it. Whatever rights she had were personal claims against the executors for a certain proportional interest in Mr. Elwood's *personal* property.

3.—The orders of the Supreme Court of New York, obtained *ex parte*, assuming to authorize the "acting executor" of Elwood's will to invest certain funds in this block, were wholly without effect, except as being a sort of evidence of good faith in the executors in making the investment. The beneficiaries under the will were still entitled to hold them to account for the personalty which came to their hands; and, if the investment should prove unprofitable, to deny the propriety of it, and compel them to respond for the amount invested, as upon an abuse of their discretion. The circumstance that a justice of the Supreme Court concurred with them in considering the investment a desirable one, might tend to prove their good faith, but it could not discharge them.

The only investments authorized in the State of New York for funds like these, are such as allow of their being always subject to recall, principal as well as interest, for the benefit of the *cestuis que trust*, and these are well settled to be government stocks and loans upon real estate to much less than its value.

King vs. Talbot, 40 N. Y., 76.

4.—But conceding the right of the executors to make the investment, whether judicious or not, and whether strengthened or not by the order of the court, their right and duty would be certainly no less clear to *sell* the property again and reconvert it into government stocks or bonds and mortgages, if at any time they should be of opinion that the preservation of the fund demanded such change.

If they had, at least any time before the Elwood Block was specifically set apart from the body of the estate to the three infant children, concluded such sale to be advantageous, neither Mrs. Scholey in her life-time, nor this plaintiff after her death, could have forbidden such change of investment. And notwithstanding all objections on the part of any beneficiary of the estate, the executors would have given absolute title, legal and equitable, to the purchaser, by their deed.

Nor has there ever been a time when Mrs. Scholey in her life-time, or this plaintiff since her death, could compel either a partition, or a conveyance of a share of the block, or an assignment of a fixed proportion of its income. How then could either of them be said to have "title" to either the block or its income; and how would that "title" be described?

Possibly *all* the beneficiaries together might have ratified the investment; but the dissent of one would have deprived an attempted ratification of all force. And three were infants, and incompetent either to ratify or repudiate.

If upon the distribution of the estate, this plaintiff had insisted that he was entitled, as the assessor claims, to one-third of the Elwood Block in severalty, both the executors and the court would haxe repudiated his claim, and would have told him, as their decree in fact told him, that his right was only to receive personal securities and money, to an amount to be ascertained upon an accounting.

If Mrs. Scholey had died intestate, it is expressly adjudicated that her interest in the Elwood estate, except so far as it was realty at the time of Elwood's death, would have passed as assets to her administrator, instead of descending to her heirs.

Rogers vs. Patterson, 4 Paige, 409.
Gibson vs. Scudamore, 1 Dick, 45.
Witter vs. Witter, 3 P. Wms., 99.
Earl of Winchelsea vs. Norcliffe, 1 Vern., 435.
Awdley vs. Awdley, 2 Vern., 192.

And this proposition seems to us conclusive of this case; for the statute no where distinguishes, in laying duties upon "legacies or distributive shares of personal property," on the one hand, and upon "successions to real estate" on the other, between descents by will and by operation of law. The fact that Mrs. Scholey made a will, while it makes an important difference as to who shall receive her property, can make none whatever as to its liability to pay a tax to the United States.

5.—But this plaintiff never got anything like the rights even which his testatrix had. Her interest in this block has been appraised by the assessor at $45,000. But before the residuary legatee gets anything from her estate he must satisfy special legacies amounting to $6,500, and pay certain annual charges for an indefinite period, amounting to $4,100 a year, to say nothing of debts. It does not appear that there is *any* residuum for the plaintiff. But if, upon his final accounting as administrator, it shall turn out that there is a residue—which may well be less than the amount upon which he has paid "succession duty"—with what propriety is *his* share to be called real estate and charged with this tax, any more than the shares of the other distributees?

6.—If it should be claimed that he had, before distribution of the Elwood estate, some title "in expectancy" to the block or some part of it, it was not until he should become

entitled "in possession" that the duty was to be paid. (§137). That certainly had not happened when this tax was levied and collected.

Blake vs. McCartney, 10 Int. Rev. Rec., 131.

7.—So far as cases at all analogous appear in the books, the authorities seem to support our position.

Attorney-General vs. Holford, 1 Price, 426.
Custance vs. Bradshaw, 4 Hare, 315.
United States vs. Watts, 1 Bond, 578.

V.

Part 2, Chap. 6, Title 1, Article 1, Sec. 4, Revised Statutes of New York.

"§ 4. Every devise of any interest in real property, "to a person who, at the time of the death of the testator, "shall be an alien, not authorized by statute to hold real "estate, shall be void. The interest so devised shall "descend to the heirs of the testator; if there be no such "heirs competent to take, it shall pass under his will to "the residuary devisees therein named, if any there be, "competent to take such interest."

2 R. S. 57 (2 Edm. Stat., 58), § 4.

Statute, *ubi supra.*

2. If, under the laws of New York, he got no "interest in real estate," he cannot be made to pay tax upon such interest.

3. It is no answer to say: (1) This *is* an interest in real estate; (2) The plaintiff has in fact got it; (3) Therefore he ought to pay duty on it. For even if both premises were true, the syllogism is not complete. It is further necessary, in order that the duty should attach, that he should have

taken it "by will, deed, or laws of descent." (1) There is no pretense of a deed. (2) The will, so far as this is concerned, is void. (3) Instead of taking *by* the law, he takes in spite of the law.

VI.

The only method in which it is possible to correct an illegal assessment of a tax is to pay under protest, and then sue to recover the amount.

Act of July 13, 1866, § § 9, 10.
City of Philadelphia vs. Collector, 5 Wall. 720.

VII.

The judgment below should be reversed, and judgment ordered for the plaintiff for $2,700, and interest at seven per cent. from May 30, 1871, besides costs.

THEODORE BACON,
Attorney and Counsel for Plaintiff in Error,
Rochester, N. Y.

In the Supreme Court of the United States.

OCTOBER TERM, 1874.

JOHN B. SCHOLEY, *Plaintiff in Error*,
vs.
FRANCIS S. REW, *Collector of Internal Revenue.*
No. 133.

In Error to the Circuit Court of the United States for the Northern District of New York.

BRIEF FOR THE DEFENDANT IN ERROR.

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BRIEF FOR THE DEFENDANT IN ERROR.

The facts are fully stated in the plaintiff in error's brief.

I.

The succession tax is not a "direct tax" within the meaning of that term in the Constitution, and is constitutional and valid.

Article 1, section 2, of the Constitution, enacts that "representatives and direct taxes shall be apportioned among the several States" according to their respective numbers. Section 8 enacts that "the Congress shall have power to lay and collect taxes, duties, imposts, and excises; to pay the debts and provide for the common defence and general welfare of the United States." Section 9 provides that "no capitation or other direct tax shall be laid unless in proportion to the

census or enumeration hereinbefore directed to be taken."

The construction always given to these clauses of the Constitution indicates that the only taxes which the Constitution regards as direct taxes are capitation taxes and taxes imposed immediately on land, which are capable of being apportioned without producing any great inequality or injustice, and that the term does not include all taxes that political economists might regard as direct taxes.

Hylton *vs.* United States, 3 Dall., 171.
Pacific Ins. Co. *vs.* Soule, 7 Wallace, 433, 446.
Veazie Bank *vs.* Fenno, 8 ibid., 533, 546.
7 Hamilton's Works, 845.
1 Kent Com., 254–256.
1 Story on Const., §§ 954, *et seq.*

The term seems to have been derived from the Roman law, which recognized two kinds of direct taxes, a capitation tax (*capitis tributum*) and a land tax (*agri tributum.*) Italy, and privileged towns which were exempted from these taxes, paid a tax of 5 per cent. on all testamentary successions (*vicesima hereditatum*) and on manumitted slaves, which, together with customs and excises, seems to have been first imposed in the time of Augustus.

Poste's Gaius, 145, 146.
Gibson's Roman Empire, ch. VI.

If all taxes that political economists regard as direct taxes should be held to fall within those words in the Constitution, Congress would be deprived of the practical power to impose such taxes, and the taxing power

would be thus greatly crippled; for no Congress would dare to apportion, for instance, the income tax.

Mr. Hamilton said, in arguing Hylton *vs.* United States: "It would be contrary to reason and every rule of sound construction, to adopt a principle for regulating the exercise of a clear constitutional power which would defeat the exercise of the power."

7 Hamilton's Works, *ubi supra.*

A succession tax is not a direct tax to any greater extent than the income tax, which was held by Mr. Justice Strong in the third circuit to be constitutional and valid.

Clark *vs.* Sickels, 14 Int. Rev. Rec., 6.

See, also, the Savings Bank cases, 6 Wallace, 594, 611.

The tax is assessed upon the land-owner "in respect of" the property. Making it a lien upon the land, is only a method of securing the tax, and does not make the tax a direct tax on land.

The distinction is illustrated by the rule of law that a covenant in a lease to pay taxes assessed on the demised land does not cover a tax imposed on the landlord in respect of the land.

2 Platt on Leases, 172, and cases cited.

Twycross *vs.* Fitchburg Railroad, 10 Gray, 293.

II.

By the will of Isaac R. Elwood, admitted to probate on the 4th of March, 1863, certain bequests were made to his three infant children and to another person; and the testator then directed that all the rest and residue

of his estate, real and personal, should be divided and distributed by his executors between his widow and three children according to the provision of the laws of New York, in the same manner as it would have been had he died intestate. (Rec., p. 5.)

His widow, and James W. Russell, and George H. Mumford were appointed executors. In May, 1864, Russell as "acting executor," petitioned the supreme court of New York for permission to invest a part of the personal property in real estate, and permission was given upon this petition, to the executrix and executors, to purchase the real estate referred to therein, and the same was afterwards conveyed to the widow, and Russell and Elwood, as executrix and executors of the will of Elwood, the survivors and survivor of them, May 10, 1864. (Rec., pp. 5, 6.)

The executors likewise, by leave of court, made improvements on the real estate left by Elwood at his decease out of the personal estate. (Rec., p. 6.)

In October, 1867, Mrs. Elwood, the widow, married the plaintiff in error, and died in September, 1869, leaving a will by which, after certain annuities and legacies, she left all the rest, residue, and remainder of her estate, both real and personal, to the plaintiff in error; and appointed him and George H. Mumford and David F. Worcester executors of her will. Rec., p. 4.

It thus appears that Mrs. Elwood, as one of the executors of her first husband's will, made, or at least approved of, the investment of a part of the personalty in the real estate under license of the supreme court, and this was done before her second marriage to the plaintiff in error. And her will directly devises and

bequeathes to her husband both real and personal property.

Under his wife's will, therefore, the plaintiff in error took an equitable interest in one-third of the estate in question, and he is liable to pay a succession tax in respect of the same, under section 127 of the act of June 30, 1864, (13 Stats. at Large, 287, 288,) which applies to "every past or future disposition of real estate by will, deed, or laws of descent, by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate or the income thereof, upon the death of any person dying after the passing of this act." The plaintiff in error became entitled to the income of one-third of the Elwood block, upon the death of his testatrix, who had herself invested the personal property left by her first husband in this estate; and he consequently became liable to pay a succession tax in respect of the same.

If the supreme court had jurisdiction to authorize the investment of the personal estate of Isaac R. Elwood in the purchase of real estate by his executors, its decree in the premises was in the nature of a proceeding *in rem*, and bound all persons interested therein; and there is nothing in the record to show that its jurisdiction was not complete.

Comstock *vs.* Crawford, 3 Wallace, 396.
Blount *vs.* Darrach, 4 Wash., C. C., 657.
Forsythe *vs.* Ballance, 6 McLean, 562.
Merriam *vs.* White, 8 Gray, 316.
Denny *vs.* Mattoon, 2 Allen, 374–376.

But there is no question here as to whether equity would treat the Elwood block as real or personal prop-

erty. The property of the testatrix had been converted by her own act into real property before she devised the same to the plaintiff in error, and this brings the case within the language of the statute.

If the plaintiff in error, under the will of his wife, acquired an interest in the Elwood block, the subsequent partition, whereby this entire estate was set off to the heirs of Elwood, does not relieve him from liability to pay a succession tax in respect of his share of it. He received its full value in other property.

III.

The objection that the plaintiff in error, being an alien, could not take real estate by devise under the laws of New York, but that such pretended devise is made by them absolutely void, does not seem to have been taken below, but, if open to him here, cannot, it is submitted, avail him for two reasons—

1st. There is nothing to show that he has not been authorized to hold real estate in the manner provided for in the statute cited in the plaintiff's brief. Indeed, as he received the benefit of the devise, the presumption would be that he had been so authorized.

2d. The plaintiff in error having never disclaimed any interest in the devise, and having received its value in the partition of Isaac R. Elwood's estate from those to whom it would descend, if the devise to him is, as he now contends, void, is estopped to set up alienage in order to avoid the payment of the succession tax due on the estate. Having received the benefit of the devise, he must bear any burden attaching to it; and

the Government, being entitled to a tax from some one in respect of this estate, may take advantage of the estoppel, being precluded by the plaintiff in error's action from claiming a tax from the heirs at law of the testatrix.

Flanigan *vs.* Turner, 1 Black, 491.
Swan *vs.* Seamens, 9 Wallace, 273, 274.
Pendleton County *vs.* Amy, 13 ibid., 297, 305.
Pickard *vs.* Sears, 6 Ad. & El., 469.
Welland Canal *vs.* Hathaway, 8 Wend., 483.
Dezell *vs.* Odell, 3 Hill, 215, 221, *et seq.*
Co. Litt., 352*a*, 352*b*.
Bigelow on Estoppel, 578, *et seq.*, and cases cited.

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